



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

November 15, 2005

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Randall G. Knox  
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Dear Mr. Knox:

You requested the Ethics Commission's advice regarding whether your representation of criminal defendants, while serving as a member of the Board of Appeals, presents any conflicts of interest under local law. The Commission has interpreted your request as presenting two questions: first, do any local conflict of interest laws preclude you from providing representation to a Department of Building Inspection ("DBI") employee in a criminal matter being prosecuted by the San Francisco District Attorney's Office; and second, will such representation cause a prohibited conflict of interest in future matters considered by the Board of Appeals.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *S.F. Charter § C3.699-12*. Written formal opinions are available to individuals who request advice about their responsibilities under local law. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.*

Because you have provided the Commission with sufficient facts to analyze whether local law prohibits you from representing criminal defendants in communications with the District Attorney's Office, the Commission is treating that portion of your question as a request for a formal opinion. But you have not provided the Commission with sufficient facts to analyze whether such representation might cause conflicts of interest in the future. Accordingly, the Commission is treating that portion of your question as a request for informal advice.

## Question

You asked the Ethics Commission to consider whether your representation of a DBI employee in a criminal matter presents a conflict of interest because of your membership on the Board of Appeals.

## Summary of Advice

Although the compensated advocacy ban in section 3.224 of the San Francisco Campaign and Governmental Conduct Code (“C&GC Code”) generally precludes City officers from representing private parties in communications with other City officers and employees, the Commission does not believe that the drafters intended the law to apply to the communications at issue. Accordingly, the Commission concludes that it will not pursue a complaint against you based on communications with the District Attorney’s Office in the course of performing legal services for your client and has in fact adopted an amendment to the law to expressly address this situation. This conclusion may or may not be shared and supported by the City Attorney and District Attorney.

The Commission cannot reach a conclusion regarding any other local conflict of interest law because you did not provide sufficient facts to analyze the application of those laws to a specific situation. Such laws, which might be implicated by your question or unknown present facts, include provisions relating to financial conflicts of interests under the Political Reform Act and California Government Code section 1090, which are incorporated into local law under section 3.206 of the C&GC Code; the requirement to disclose personal, professional and business relationships under section 3.214 of the C&GC Code; and provisions governing incompatible activities under section 3.218 of the C&GC Code.

## Background

You provided the Ethics Commission with the following information:

You are an attorney who has served as a commissioner on the Board of Appeals since July 2004. Among other matters, the Board of Appeals hears appeals from decisions of DBI and the Building Inspection Commission. Recently, a DBI employee, Augustine Fallay, requested that you represent him in a pending criminal case, which alleges that he accepted bribes while employed at DBI and the Planning Department. In a telephone conversation, you informed staff that the prosecution of Mr. Fallay was brought by the San Francisco District Attorney after an investigation by the Federal Bureau of Investigation and the District Attorney’s Office. Your representation of Mr. Fallay requires that you communicate with the District Attorney’s office on his behalf.<sup>1</sup> You state that Mr. Fallay has never appeared before the Board of Appeals and that you do not recall having seen his name on any appeals. You add that you had never met Mr. Fallay until he contacted your office seeking representation, and that he was referred to you by a mutual acquaintance who did not know that you sat on the Board of Appeals. Finally, you indicate that you will recuse yourself from any cases before the Board of Appeals involving Mr. Fallay or any other person involved or implicated in the investigation and prosecution of Mr. Fallay.

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<sup>1</sup> You also indicated that recently you accompanied Mr. Fallay on a visit to the City Attorney’s office. Because Mr. Fallay was represented by a union representative at that meeting, it was unclear whether you were also providing representation to him at the meeting. As discussed in this letter, the conflict of interest laws would not bar you from communicating with the City Attorney’s office on behalf of Mr. Fallay in your capacity as a licensed attorney.

## Discussion

You asked the Ethics Commission to consider whether your representation of a DBI employee in a criminal matter presents a conflict of interest because of your membership on the Board of Appeals. The Commission has interpreted your request as presenting two questions: (1) do any local conflict of interest laws preclude you from providing representation to a DBI employee in a criminal matter being prosecuted by the San Francisco District Attorney's Office? and (2) will such representation cause a prohibited conflict of interest in future matters considered by the Board of Appeals? Both of these questions are discussed below.

### A. Providing Criminal Defense Representation to a DBI Employee

The Commission has identified only one section of local law, section 3.224 of the C&GC Code, that potentially affects your ability to provide representation to defendants in criminal actions brought by the District Attorney's Office. Section 3.224, the compensated advocacy ban, generally precludes City officers from receiving compensation to communicate on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision.<sup>2</sup> In your representation of Mr. Fallay, you will be required to communicate with the District Attorney's Office and seek to influence decisions that that office may make about the case. While an exception exists that permits communications with the City Attorney, no such exception exists for the District Attorney. The Ethics Commission believes the extension of the exception to the District Attorney's office is appropriate and has adopted amendments to establish such. In the meantime, the Ethics Commission will not pursue an enforcement action against you if you represent your client in the manner prescribed above.

The compensated advocacy ban was originally adopted by the voters in 1986. As originally adopted, the prohibition was limited to communications made by City officers to members of City boards and commissions and their respective staff.<sup>3</sup> Thus, when originally adopted, the

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<sup>2</sup> Section 3.224 states:

(a) **Prohibition.** No officer of the City and County shall directly or indirectly receive any form of compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision.

(b) **Exceptions.** This section shall not apply to any communication by: (1) an officer of the City and County on behalf of the City and County; (2) an officer of the City and County on behalf of a business, union, or organization of which the officer is a member or full-time employee; (3) an associate, partner or employee of an officer of the City and County, unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City and County officer; or (4) a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter.

(c) **Waiver.** The Ethics Commission may waive the prohibitions in this section for any member of a City board or commission who, by law, must be appointed to represent any profession, trade, business, union or association.

<sup>3</sup> Specifically, the law provided, "No officer of the City and County may, during the term of office, engage in compensated advocacy before any City and County board or commission, or any member of the board or commission or its staff, in order to represent any private interest, for which representation the officer receives, directly or indirectly, any compensation, reward or gift." *See former C&GC Code § 3.300(b)*. Section 3.300 was

compensated advocacy ban did not preclude City officers from representing criminal defendants in communications with the District Attorney's Office because the District Attorney's Office is not a City board or commission.

As part of its overall review of the City's conflict of interest laws in 2002 and 2003, the Ethics Commission recommended changes to the compensated advocacy ban, which the voters approved in the November 2003 election. One of changes the Commission recommended was to expand the scope of the prohibition to communications with any other City officer or employee regardless of whether the officer or employee was part of a City board or commission. *See* C&GC Code § 3.224(a). Another change was to codify an exception to the ban so that a City officer acting as a licensed attorney could represent clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter. *See* C&GC Code § 3.224(b).

When the Commission considered this exception, it wanted to permit City officers who are licensed attorneys to be able to represent clients in "legal matters." *See* April 10, 2003 staff memorandum on conflict of law amendments, at p. 7. Accordingly, the Commission proposed, and the voters adopted, an exception to the compensated advocacy prohibition for communications by a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter. *See id.* According to the Commission's minutes, this exception was meant to permit the "status quo to continue." *See* April 13, 2003 Ethics Commission minutes at p. 7. The Commission's minutes explain that because the compensated advocacy ban was being amended to extend to communications before other employees as well as boards and commissions, the addition of the attorney exception would specifically allow attorneys who are also City officers to continue to represent their clients in communications with the City Attorney. *See id.*

Communications with the District Attorney's Office were not included in this list of attorney communications. However, since the purpose of the exception was to permit the "status quo to continue," and the status quo at the time the exception was proposed and adopted was that attorneys who were also City officers were permitted to communicate with the District Attorney's Office on behalf of their clients, the Commission believes it is appropriate and reasonable to include the District Attorney in this exception. Therefore, the Commission adopted amendments extending the exception in section 3.234(b)(4) to communications by a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the District Attorney's Office. As a point of information, the Ethics Commission's actions in this area must also be ratified by the Board of Supervisors to become law. In the meantime, the Commission will not pursue an enforcement action against you if you represent your client in the manner prescribed above.

This conclusion is supported by the purposes of the compensated advocacy prohibition. The compensated advocacy ban was designed to eliminate the undue influence that one City officer

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part of an initiative ordinance adopted by the San Francisco voters on June 3, 1986, and was formerly codified as Sections 1-4, 6, and 7 of Appendix K to the 1932 Charter.

may have because of his or her position as a City officer over another City officer or employee.<sup>4</sup> There are various reasons why City officers acting in their capacity as licensed attorneys cannot exercise such undue influence over attorneys representing the City. These reasons apply equally to the City Attorney's Office and the District Attorney's Office. For example, most of the government decisions that a City officer acting in his or her capacity as a licensed attorney would be attempting to influence would not be made by the City Attorney's Office or the District Attorney's Office, but rather by a judge overseeing the civil or criminal proceeding. Furthermore, although any pleadings a City officer files on behalf of his or her client would be provided to the City Attorney's Office or District Attorney's Office, a court will ultimately decide the issues raised in the pleadings. Likewise, a court is also ultimately responsible for the outcome of these actions. For example, a judge must approve plea agreements between the District Attorney's Office and any of a City officer's clients. Finally, a judge or jury must decide the guilt or innocence of a criminal defendant or the liability of the City in a civil action.

The Commission recognizes that the District Attorney's Office plays an important role in the outcome of criminal actions, and may, through its exercise of prosecutorial discretion, dismiss a pending case. But the potential for undue influence or unfair advantage in matters handled solely by the District Attorney's Office is mitigated by the fact that all attorneys in the District Attorney's Office are bound under the California Rules of Professional Responsibility by a duty of loyalty to their client, the People of the State of California. *See* Cal. Rules Prof. Resp. 3-310. In particular, an attorney in the District Attorney's Office may not pursue an action when the attorney knows or should know that the charges are not supported by probable cause. *See* Cal. Rules Prof. Resp. 5-110. The attorneys in the District Attorney's Office must adhere to these rules and are not likely to risk discipline from the State Bar by providing preferential treatment to an attorney who is a City officer.

For these reasons, the Commission concludes that it will not pursue an enforcement action against you under Campaign and Governmental Conduct Code section 3.224 for representing Mr. Fallay in communications with the District Attorney's Office about the pending criminal action against him.

#### B. Potential Conflicts of Interest in Future Matters Considered by the Board of Appeals

You have not provided the Commission with sufficient facts to determine if your representation of Mr. Fallay will create a conflict of interest in future matters that may be considered by the Board of Appeals. Accordingly, we have provided below an overview of the laws we believe

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<sup>4</sup> The ballot materials for the 1986 voter initiative that originated the ban on compensated advocacy state that the Ordinance was proposed in part to prohibit undue influence by City officers over other City officers and employees when providing representation to clients before City boards and commissions for pay.<sup>4</sup> *June 3, 1986 San Francisco City and County Propositions, Ballot Simplification Committee Analysis of Prop. F, at p. 51.* The initiative was designed "to eliminate undue influence by officeholders retained as paid lobbyists for projects requiring City approval." *Id., Argument in Favor of Prop. F, at p. 52.* In addition, the ballot arguments explain "to reduce undue influence, Proposition F outlaws the practice of City Commissioners . . . representing special interests for pay before City Commissions and Boards. City Commissions should render their decisions deliberately and impartially, not be swayed by the political clout of the lobbyist appearing before them, or by any political favors those lobbyist/politicians might promise." *Id., at p. 53.*

could potentially be implicated in the future. Please do not hesitate to contact us again if specific facts arise that call into question your ability to adhere to these laws.

### *1. Financial Conflict of Interest Laws*

Two laws, section 87100 et seq. of the Political Reform Act (“PRA” or “the Act”) and Government Code section 1090, govern financial conflicts of interest. Both these laws are incorporated into local law in sections 3.206 (a) and (b) the C&GC Code, respectively.

The PRA, incorporated into local law as C&GC Code section 3.206(a), prohibits public officials from making, participating in making, or in any way attempting to use their official position to influence a governmental decision in which they have a financial interest. Under the Act, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, different from its effect on the public generally, on the official or on a member of his or her immediate family. When a public official has a conflict under the PRA, the official must disclose the conflict and abstain from participating in the decision. *See* Cal. Gov’t Code § 87100. A conflict of interest can only arise from particular kinds of economic interests. *See* “Can I Vote? An Overview of Public Officials’ Obligations Under the Political Reform Act’s Conflict-of-Interest Rules,” FPPC booklet available at <http://www.fppc.ca.gov/PDF/booklet.pdf>.

California Government Code section 1090, incorporated into local law as C&GC Code section 3.206(b), codifies the common law prohibition against public officials having a personal interest in contracts they make in their official capacities. The section was enacted “to insure that public officials ‘making’ official contracts not be distracted by personal financial gain from exercising absolute loyalty and undivided allegiance to the best interest of the entity which they serve, and at least with respect to those contracts, it does so by removing or limiting the possibility of their being able to bring any direct or indirect personal influence to bear on an official decision regarding them.” 66 Ops. Cal. Atty. Gen. 156 (1983), citations omitted. The purpose of section 1090 is to prevent self-dealing: “the section is violated whenever it can be established that a public employee had the opportunity to and did influence [the contract’s] execution or participated in its making, either directly or indirectly to promote his personal interests.” *Id.*

Should a matter in which Mr. Fallay has a financial interest exist or come before the Board of Appeals in the future, you should contact us again as you may need to abstain from participating in any decision affecting him.

### *2. Disclosure of Personal, Professional or Financial Interests*

Under section 3.214 of the C&GC Code, a City officer must disclose on the public record any personal, professional or financial interest in the subject of a governmental decision being made by the officer where as a result of the relationship, the ability of the officer to act for the benefit of the public could reasonably be questioned. Should a matter relating to Mr. Fallay come before the Board of Appeals, you would be required to disclose your relationship with him.

### 3. *Incompatible Activities*

Under section 3.218 of the C&GC Code, no City officer may engage in any employment, activity, or enterprise that the board of commission has identified as incompatible in a statement of incompatible activities adopted by the Ethics Commission. The Ethics Commission is currently reviewing all statements, including one submitted by the Board of Appeals. For the reasons discussed above, the Commission does not believe that representation of a client in a criminal matter before the District Attorney's Office would constitute an incompatible activity for members of the Board of Appeals who are licensed attorneys. Nonetheless, you should abstain from engaging in any activities prohibited by an approved statement of incompatible activities.

#### Conclusion

The Commission concludes that, although not spelled out in current law that communications with the District Attorney's Office are permissible, the Ethics Commission would not pursue an enforcement action against you for communicating with the District Attorney's Office to represent Mr. Fallay, an employee of the DBI, in a pending criminal case. You have not provided any information to suggest that Mr. Fallay has an interest in any matter pending before the Board of Appeals. Thus, the Commission cannot determine whether your representation of Mr. Fallay would preclude you from participating in any future decisions at the Board of Appeals. You should contact the Commission again if facts arise that implicate any other local conflict of interest laws such as the financial conflict of interest laws under the PRA and Government Code section 1090, as incorporated into local law, as well as provisions related to disclosure of personal, professional and financial interests and prohibitions of incompatible activities.

I hope you find this information helpful. If you have additional questions on this matter, please contact me at (415) 581-2300.

Sincerely,

John St. Croix  
Executive Director

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